

CORNEL McGEE)
Claimant)
VS.)
) Docket No. 264,949
EXCEL PERSONNEL)
Respondent)
AND)
)
EQUITY MUTUAL INSURANCE COMPANY)
Insurance Carrier)

Claimant reported this accident to one of his supervisors in the office, but the written incident report failed to mention that he had also injured his back at that time. He was taken directly to Lawrence Memorial Hospital. The hospital records in evidence for that

date show claimant was treated for both a hand contusion and a lumbar muscle strain. He was given light duty restrictions. Claimant's back pain progressively increased and he returned to Lawrence Memorial Hospital the following day. Claimant returned to work for only a short time before being told that accommodated work was not available and he was no longer needed.

Respondent contends claimant's testimony about the injury is not credible because of some inconsistencies concerning the mechanism of injury and the sequence of his onset of symptoms. In particular, there was some inconsistent testimony about whether or not he felt back pain immediately. In addition, respondent points out that claimant suffered a prior back injury in 1993 or 1994.

The issues raised in this appeal turn primarily on the credibility of the claimant's testimony. Although claimant said there were several persons present when he was injured, claimant was the only witness to testify at the preliminary hearing. If claimant is believed, his testimony supports a finding that his work caused an onset of low back pain on January 31, 2001, which progressively worsened during the rest of that day and evening. Respondent admits that it received notice of accident that same day, but denies claimant injured his back in that accident. While respondent points out several inconsistencies which tend to undermine claimant's testimony somewhat, it is significant that the ALJ observed the in-person testimony and believed the claimant. The Board generally gives some deference to an ALJ's evaluation of the credibility of witnesses whom the ALJ had the opportunity to observe while testifying.

In this case, respondent offers no testimony that would directly contradict claimant's explanation for how his back was injured. Although respondent does offer evidence that claimant did not report his back injury or back symptoms at the same time as when claimant first reported that his hand was injured, claimant explained this by saying he initially did not place a great deal of significance to what seemed to be a minor injury to his back because he initially was more concerned about the contusion to his hand. After he left work, the back pain worsened. Timely notice is not an issue. Claimant's testimony concerning the mechanism of his back injury is consistent with the type of work he performed. There is nothing in the record to suggest an alternative explanation for the back injury. The preexisting back condition was too remote to account for claimant's acute symptoms. Claimant testified it had been years since he had last received treatment for his back and that he had not experienced any back symptoms since then until the January 31, 2001 accident. Furthermore, this back injury would be compensable even if it were found to be an aggravation of a preexisting condition.

Considering the record as a whole, the Board agrees with the ALJ's determination that claimant's testimony is credible and a compensable back injury claim has been proven.

As provided by the Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing on the claim.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Brad E. Avery on June 4, 2001, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 2001.

BOARD MEMBER

c: Frank S. Eschmann, Attorney for Claimant
Victor B. Finkelstein, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Workers Compensation Director